

DEPARTMENT OF STATE REVENUE

Revenue Ruling # 2002-02ST

January 25, 2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Sales/Use Tax – Electric Power Generating Station and Wholesale Sales of Electricity

Authority: IC 6-2.5-5-10, IC 6-2.5-4-5, Rule 45 IAC 2.2-4-11

The taxpayer requests the Department to rule on the application of sales/use tax to a electric power generating station and to the wholesale sales of electricity.

The taxpayer submitted the following statements in relation to this request for Department review.

1. The taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities, including without limitation all power generation equipment (such as turbines and generators) and consumables (such as natural gas and fuel oil, including such items purchased from an affiliate), will be exempt from Indiana sales and use tax.
2. Wholesale sales of electricity by the taxpayer and its affiliates will not be subject to Indiana sales and use tax.

STATEMENT OF FACTS

The taxpayer is a limited liability company organized and existing under the laws of the State of Indiana. The taxpayer is an indirect, wholly owned subsidiary of one of the largest unregulated producers of electricity in the United States. On February 23, 2001, the Indiana Utility Regulatory Commission (hereinafter, "IURC") ruled that the Taxpayer was a "public utility" as defined under IC 8-1-2-1. The IURC further declined to exercise its jurisdiction over Taxpayer's construction, ownership and operation of a gas-fired, combined cycle electric generating facility. The IURC's Order incorporates by reference certain terms of a settlement agreement entered into between the taxpayer and the Indiana Office of Utility Consumer Counselor (hereinafter, "Settlement Agreement").

The taxpayer has agreed to waive certain rights and to fulfill certain obligations under the terms of the Settlement Agreement. First, the taxpayer agreed that the facility will be connected to an existing gas supply pipeline (not owned by taxpayer) that crosses the taxpayer's property. The

taxpayer is prohibited, however, from connecting or supplying any third party with gas service through the pipeline without the IURC's prior approval. Second, the taxpayer has waived any and all special rights, powers and privileges granted to Indiana public utilities, including without limitation, the power of eminent domain and the use of public rights-of-way. Third, the taxpayer has agreed that it will enter into interconnection agreements with retail energy merchants and that such agreements will be regulated by the Federal Energy Regulatory Commission (hereinafter, "FERC") in accordance with its jurisdiction under the Federal Power Act, 16 U.S.C.A. § 791(a) et seq. (hereinafter, "FPA"). Fourth, among other obligations, the taxpayer has agreed that all electricity generated by the Facility will be for resale into the wholesale market and not at retail. The wholesale electric energy sales will be at rates that will be subject to the FERC's jurisdiction, as sales made by an Exempt Wholesale Generator (hereinafter, "EWG").

The taxpayer has filed an application with the FERC for a determination that it will be qualified as an EWG. As an EWG, the taxpayer will be prohibited from making retail sales. Accordingly, the taxpayer anticipates that most of its sales of electricity will be made to electric power-marketing affiliates for resale. The affiliates will, in turn, resell the electricity to other public utilities, electric cooperatives, municipal electric generators, other power marketers, and other entities for resale. Any other sales of electricity made by the taxpayer will be at wholesale to other entities, including investor-owned and municipal utilities.

DISCUSSION

IC 6-2.5.5.10 states:

Transactions involving tangible personal property are exempt from the state gross retail tax, if:

- (1) the property is classified as production plant or power production expenses, according to the uniform system of accounts which was adopted and prescribed for the utility by the Indiana utility regulatory commission; and
- (2) the person acquiring the property is:
 - (A) a public utility that furnishes or sells electric energy, steam, or steam heat in a retail transaction described in IC 6-2.5-4-5...

IC 6-2.4-4-5 states:

- (b) A...person engaged as a public utility is a retail merchant making a retail transaction when the...person furnishes or sells electrical energy, natural or artificial gas, water, steam, or steam heating service to a person for commercial or domestic consumption.

Regulation 45 AIC 2.2-4-11 defines a public utility for sales tax purposes as follows:

- (d) the term "public utilities" as used in this regulation [45 IAC 2.2] means any organization which is engaged in the furnishing or selling of electricity...and having the right of eminent domain or subject to government regulation in connection with the furnishing of public utility services...

The IURC has ruled that the taxpayer is a “public utility” pursuant to IC 8-1 thus making the taxpayer “subject to” IURC regulation and, in addition, the taxpayer will be subject to regulation as a public utility by FERC under the Federal Power Act; therefore, the taxpayer is a “public utility” for purposes of both IC 6-2.5-4-5 and IC 6-2.5-5-10 and within the meaning of 45 IAC 2.2-4-11. As a “public utility,” all of the taxpayer’s machinery, equipment and other tangible personal property that is treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities are exempt from Indiana sales/use tax.

RULING

The taxpayer’s purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities, including without limitation all power generation equipment (such as turbines and generators) and consumables (such as natural gas and fuel oil, including such items purchased from an affiliate), will be exempt from Indiana sales and use tax.

DISCUSSION

IC 6-2.5-4-5(b) provides that sales of electrical energy by a public utility constitute retail transactions subject to sales tax; however, IC 6-2.5-4-5(c)(2) exempts sales to “another public utility.”

(c) Notwithstanding subsection (b), a...person engaged as a public utility is not a retail merchant making a retail transaction when:

(2) The...person sells the services or commodities listed in subsection (b) to another public utility or power subsidiary...;

For the purpose of the imposition of sales tax under IC 6-2.5-4-5(c), the Department has determined that “a person engaged as a public utility” includes anyone selling utility services. The “sales for resale” (wholesale sales) by the taxpayer, therefore, are exempt from sales tax as the purchasers of the electricity, also, meet the definition of “public utility.” Also, both the taxpayer’s affiliate and the purchasers of the electricity sold by the taxpayer’s affiliate are “public utilities,” hence, the sales of electricity by the taxpayer’s affiliate are not subject to sales tax.

RULING

Wholesale sales of electricity by the taxpayer and its affiliates will not be subject to Indiana sales and use tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer’s facts and circumstances, as stated herein, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other

taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in a statute, a regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Department of State Revenue